No. 22,215

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JACK F. LOUGHTON,

Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

ON PETITION FOR REVIEW OF THE ORDER OF THE

TAX COURT OF THE UNITED STATES

REPLY BRIEF FOR THE PETITIONER

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The brief of respondent has been received and read and the taxpayers' brief has also been reviewed.

One thing is amply clear:

The taxpayers at no time received any notice of a proposed deficiency, actual, or constructive, thirty-day letter; no ninety-day letter; nothing to advise them that a deficiency in tax had ever been proposed.

In this day of rapid and efficient communication it seems strange the office of District Director

of Internal Revenue who wanted to notify a person was not successful in doing so, when taxpayers each maintained separate business locations in the same city as the District Director (from whom the notice is sent) and when the taxpayers have appointed an attorney who maintains an office and home in the same city. It is even more incredible that the Oregon District Director of Internal Revenue would want to deprive taxpayers of an opportunity to object to such an important document as a proposed claim of Three Thousand Six Hundred Dollars ($3,600.00), plus interest accumulated over a long period of years (accumulated for the convenience of the Government for which taxpayers repeatedly signed waivers and extensions at the agent's request).

The respondent's brief has been searched in vain for some explanation as to why no attempt was made to get in touch with one of the taxpayers (the agent had not had any difficulty with contacting Mr. Houghton for extensions for the Government's convenience) or the attorney?

The brief is absolutely silent in that regard.

Why, when the notice was returned undelivered could not the agent make a simple call to determine a correct address? He had called the attorney at frequent

intervals and discussed the matter with him and knew of his intention to represent the taxpayers if a deficiency was asserted.

Respondent's brief does admit that the question of "last known address" is a matter of proof in each case, (R. Br. 9) and cites, Maxfield v. Commissioner, 153 F. 2d 325, 326 (CA 9 1946). That admission represents considerable modification from respondent's position in the Tax Court.

Respondent's brief ignores completely the rule that the intent of Congress was to make a reasonable effort to assure delivery of the notice (Tenzer, supra).

To the contrary, the entire brief reduced to its essence is an attempt to convince this court that the District Director should not even make a reasonable attempt at notice even where they knew the only notice ever sent had never been received by the taxpayer nor this attorney.

No statute, no rule of law, nothing, is cited in respondent's brief which ways that the District Director after notice has been returned undelivered, need do nothing more, or that he can ignore information in his own files such as power of attorney (perfect or defective and unrevoked), dealings with the attorney, whose address and telephone number were well known to

the District Director, business addresses of both clients and the attorney which were consistently recognized by the agent who also knew of the difficulty of locating one of the taxpayers due to extended business absences.

If all this is true, and a very simple effort would have located the taxpayers or given them notice, our congressional intent would be pretty shabbily avoided if the procedure suggested were to be approved by this Court.

The congressional intent is repeated, and strengthened, in the new law (Senate report) (P.L. 89-332) in which is stated:

> "* * * It would also require the agencies to deal with the counsel so selected." (App. Br. 47).

But says the respondent, "while it is true the statute does not require a declaration to be in any particular form, your attorney did not file a "formal written statement containing certain information." (Resp. Br. 15)

The statement seems to be self-contradictory. An examination of the law does not say anything about a "formal written statement," and respondent admits that no special form is required (Resp. Br. p. 15).

In this case, the attorney represented that he was duly admitted to practice in that he represented himself to be an attorney (letterhead, previous dealings, number of his Treasury card) and no person may by law practice law in the State of Oregon without being currently in good standing and be admitted to the highest court in the State of Oregon (ORS 9.160, 9.220). Since the Oregon statute presumes that the law has been obeyed (ORS 41.360 [33]), the signature of the lawyer and the use of his printed stationery constitutes a sufficient representation that he is in good standing and is admitted to the highest court in the state. The fact that the taxpayers signed a power of attorney form appointing the attorney to represent them and that it also was submitted under cover of a printed letterhead would be sufficient to show the attorney's authorization, and the taxpayers' intent to be represented for tax purposes.

While admittedly, the form of the representation was not in the form which respondent might prefer, it nevertheless was sufficient under the circumstance presented where no particular form is required, and if the District Director desired a different and more formal declaration he had ample opportunity to call any deficiency to the attention of the lawyer and the tax-

payer. Furthermore, he had the enrollment number of the attorney on the power of attorney form and could have consulted his own records if he had any doubt.

Instead, the District Director waived any such requirements and dealt with the attorney. He is estopped to assert any technical difficulties under the circumstances of this case.

But assuming that the declaration was insufficient, wouldn't it still be a reason to contact the attorney after the notice had been returned "undelivered?"

Just one question:

Why wasn't a copy sent to the attorney?

If that had been done, this problem would not be before the Court.

The respondent's brief now admits (R. Br. 12) that a notice complies with the statute if sent to address where the Commissioner reasonably believes the taxpayer wishes to be reached and cites Delman v. Commissioner, 20 AFTR 2d, 227, (CA 1 1967) and Clarke's Estate v. Commissioner, 173 F. 2d 13 (CA 1 1949).

Respondent's position previously was that notice was sufficient if sent to any address in the files of the Government unless a notice of change of address had been received.

The respondent did not previously cite the cases of Delman or Clarke's Estate and did not in this Court cite Expanding Envelope and Folder Corporation v. Sholtz, 20 AFTR 2d 5758, (CA 3 Nov. 1967).

Those cases now cited represent a change of position by respondent since the Tax Court hearing, and (at least to this writer) appear to be contrary to the position for which respondent cites them.

Those cases rather confirm the position contended by the taxpayers, to-wit: that when a taxpayer is represented by counsel, the attorney should be notified at least by a copy of the notice.

The cases cited (Delman and Expanding Envelope) present a converse factual situation to the present case in that the attorney (or accountant) was notified and the taxpayer did not take prompt action in spite of being notified by the representative (Delman v. Commissioner), and objected to the use of the attorney's address as a last known address.

In the Expanding Envelope case, the argument was opposite also to the facts of this case, in that the taxpayer took the same position as the respondent takes here; to-wit: that the consent forms contained addresses different from that of the attorney and that an agent had asked the attorney for taxpayers' correct address.

In the Expanding Envelope case, taxpayers contended that the addresses on certain waivers and extensions constituted last known addresses rather than that of the taxpayers' lawyer, since they were filed after the power of attorney. It further contended that the agent's request for a correct address from the attorney constituted a recognition that the attorney's address was not a "last known address."

The Third Circuit rejected the argument saying:

> "Neither activity is any evidence from which the Service should have inferred that the taxpayers were revoking the instruction contained in the powers."

Both cases would appear to hold that the appointment of a representative is such an act as would constitute a place where the taxpayers wished to be reached in connection with his tax problems.

We agree with those decisions and cite them as authority for the proposition that the attorney's address in this case was a "last known address" where the taxpayer wished to be notified regarding his tax problems.

While it is surely regretted that certain formal matters were inadvertently omitted in this situation; nevertheless, the Government should not take much comfort in that fact since the same instruments

were sufficient to provide a very simple and easy way to notify the taxpayers both before and after the 90 day notice was returned "undelivered."

A last known address does not have to come from a formal document. It may come from correspondence, directories, phone calls, agent's records, powers of attorney, or any other information. (See Mansfield v. Commissioner, regarding an address secured from stock records). It would make no difference whether or not a power of attorney was completed in the manner desired by the District Director so long as it indicated that the address is the address where taxpayer wished to be notified regarding his tax problems.

As stated in the case of Delman v. Commissioner.

> "By using the phrase "last known address" Congress must have intended that notice be sent to that address where the secretary (or his delegate) reasonably believed the taxpayer wished notice to be sent."

It is not without significance that in all cases cited where notice was sent to a lawyer, the notice was held sufficient. Had a notice (whether copy or original) been sent to the lawyer here it would have been sufficient in this case.

The jurisdiction of the Tax Court would seem to be clear, or if not, it should be clear that no notice has yet been given of a proposed deficiency. The latter would give the parties a chance to properly consider the proposed assessment on giving a new notice.

Respectfully submitted,

Warde H. Erwin

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39, of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing reply brief is in full compliance with those rules.

Dated: _____ day of March, 1968.

_____

Attorney

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Mar. 1, 1968

[illegible] of the Clerk
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[illegible]
[illegible], California 94101

[illegible]215

Re: Houghton v. Commissioner

I am [illegible]fused as to the rules on Reply

Page 11-6, Rule 18 says "method of preparation of reply brief must "conform in style, method of preparation, [illegible] number, with appellant's opening brief."

In the instant case, this was by printing.

The Commissioner files its brief in duplicating [illegible] under the paragraph which includes "when a party is permitted, under this rule, to file typewritten briefs," and we assume the Government received some type of permission.

We would like to prepare the reply brief in this manner, but do we have to comply with conforming to the style and manner of the appellant's brief?

Our time will soon expire; the brief is ready for finalization, and we would therefore appreciate a reply by return mail if possible.

Yours very truly,

Warde H. Erwin

March 5, 1968

Dear Mr. [illegible]win:

You may file your brief in [illegible] same manner as the appellee's.

[illegible]liam B. Luck, Clerk of Co[illegible]